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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1616

SAM H. JOHNSON,

Petitioner,

versus

PENROD DRILLING COMPANY,

Respondent,

No. 74-1617

JAMES L. STARNES,

Petitioner,

versus

PENROD DRILLING COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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MAY IT PLEASE THE COURT:

The decision by the United States Court of Appeals for the Fifth Circuit sitting *en banc* rendered on March 21, 1975, does not warrant review by this Court.

Petitioners have filed separate petitions for a writ of certiorari. Due to the common questions raised, Respondent proffers a singular reply.

OPINIONS BELOW

The complete original panel opinion is unreported since it was amended on petition for rehearing on March 29, 1973, reported at 469 F.2d 897 (5th Cir. 1973). The reported panel opinion is at 469 F.2d 897 (1972). The *en banc* opinion of the Fifth Circuit is reported at 510 F.2d 234 (5th Cir. 1975). All opinions appear in the appendices to the Petitions.

REASONS WRIT SHOULD BE DENIED

1. The Fifth Circuit's *En Banc* Decision was Correct in Holding that Respondent is Entitled to a Trial by Jury. The Fifth Circuit has not Held that there is a Right to Jury Trial in Admiralty and Maritime Claims within the Meaning of 9 (h). The Decision is Supported by the Jurisprudence and there is no Conflict Among the Circuits or with any Decision of this Court.

2. The Fifth Circuit's *En Banc* Decision Excluding Evidence of the Influence on Damages of Future Possible Inflation or Deflation and Requiring Reduction to Present Value is Correct. It does not Conflict with the

Decision of any other United States Court of Appeal or any Decision of this Court; it Adheres to Established Principles.

STATUTORY PROVISIONS

Petitioners' second question is whether or not Petitioners through the device of amending their Complaint to state admiralty and maritime claims under Rule 9 (h) can effectively withdraw their demands for jury trials without compliance with the procedures set forth in Rule 39 (a) for the withdrawal of such demands and thereby deprive Respondent of its Seventh Amendment right to a jury trial.

The Fifth Circuit's decision upholding the right to trial by jury involves provisions of the Federal Rules of Civil Procedure, 28 U.S.C.A., and the Seventh Amendment, United States Constitution. These authorities are set forth in the panel opinion, 469 F.2d 897, 901-902 (5th Cir. 1972), as adopted by the Fifth Circuit *en banc*, 510 F.2d 234, 235 (5th Cir. 1975).

A pertinent provision of Rule 38, paragraph (d), was not included in the opinion. It provides:

> "Rule 38. Jury Trial of Right.
>
> (d) Waiver. The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties."

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STATEMENT OF THE CASE

Petitioners filed civil actions in the United States District Court for the Eastern District of Texas seeking damages for alleged personal injuries. They alleged diversity of citizenship, jurisdictional amount, Jones Act jurisdiction at law, and claims for unseaworthiness and maintenance and cure. They filed written demands for a trial by jury; and each case was assigned for trial by jury.

Both cases remained set for jury trial for more than three years, when Petitioners filed Amended Complaints in which they re-averred earlier factual allegations and also stated their claims were admiralty and maritime in nature. The original Complaints were not withdrawn. The demands for jury trial were never withdrawn.

Preceding trial, the District Judge removed the cases from the jury docket, and advised Respondent that they would be tried to the Court. The Respondent had never consented at any time in either case to a waiver by Petitioners of their demand for trial by jury. Respondent filed motions for trial by jury in both cases, emphasizing its right to jury trial, and Rule 38 and Rule 39 of the Federal Rules of Civil Procedure. The motions were summarily overruled on the eve of trial. (Facts reported at 469 F.2d 897, 899-901.)

After successive trials, the District Court found liability. Petitioners offered no evidence to demonstrate any increases in their past annual individual earnings or to support increased earning potential. Based exclusively upon forecasted future national in-

flationary trends, without any relationship to Petitioners' earnings records, or their impact upon an award paid in current dollars, the Court held that both Petitioners' annual earnings would forever increase through age 65 at a constant rate. It awarded enormous damages for loss of wages.[1]

Respondent effected an appeal to the Fifth Circuit on multiple bases. The Fifth Circuit held that Respondent had been wrongfully deprived of a trial by jury and reversed,[2] holding that on remand evidence should not be considered of the possible influence of speculative future inflationary or deflationary monetary trends upon a judgment for future loss of wages.

On application for rehearing by Petitioners, the opinion was modified to delete evidentiary instructions. The modification was due to the concomitant decision of another panel of the Fifth Circuit in *Canal Barge Co., Inc. v. M. K. Griffith*, 480 F.2d 11 (5th Cir. 1973). Respondent's application for a rehearing *en banc* was granted to resolve an intracircuit conflict.

The Court of Appeals *en banc* upheld Respondent's right to a trial by jury; held that the effect of possible

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1 Johnson, age 33, in his original Complaint (R. 9) and last Amended Complaint filed after the trial (R. 98), alleged earnings of $6,084 per year. The Court found damages of $380,470.97 of which $325,370.97 was solely for loss of wages (R. 50). The judgment was reduced 20% for comparative negligence.

Starnes, age 32, alleged earnings of $550 per month or $6,600 per year (R. 8). In the judgment, loss of wages was awarded in the amount of $409,929.43 (R. 164).

2 Accordingly, other issues raised were not decided.

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future inflation was not to be included in a present rule for calculating future damages; held that the impact of income taxes was not to be considered; and required reduction to present value by use of an appropriate interest rate prevailing at the time and place of trial.

ARGUMENT

1. The Fifth Circuit's En Banc Decision was Correct in Holding that Respondent is Entitled to a Trial by Jury. The Fifth Circuit has not Held that there is a Right to Jury Trial in Admiralty and Maritime Claims within the Meaning of 9 (h). The Decision is Supported by the Jurisprudence and there is no Conflict Among the Circuits or with any Decision of this Court.

There is no dispute that Petitioners both filed civil actions at law in 1966 and requested a trial by jury. They alleged diversity jurisdiction[3] and they alleged Jones Act jurisdiction. These pleadings were never withdrawn by the Amended Complaints; however, if Petitioners intended to withdraw the jury demand in this manner, it is indisputable that they never obtained the consent of Respondent as required by Rule 38 (d) and Rule 39 (a).

The panel opinion of the Court of Appeals, adopted by the Court *en banc*, holds that in the context of these cases plaintiffs cannot unilaterally waive the demand

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3 Petitioner Johnson in his brief before the Court of Appeals *en banc* and now in this brief claims that there was really no diversity jurisdiction. This was never factually resolved. However, it is not central to the Fifth Circuit's decision.

for trial by jury and deprive defendants of a vested right under the Seventh Amendment. The decision is not a case of first impression and is in accord with decisions in other Circuits.

In its opinion, the Fifth Circuit Court discussed the decision of the District Court of Maryland in *Banks v. Hanover Steamship Corp.*, 43 F.R.D. 374 (D.C.M.D. 1967) in reconciling Federal Rules 9 (h), 15 (c) and Rules 38 and 39 (469 F.2d 897, 903). It did not misconstrue the *Banks* decision, particularly the action most similar to the case at bar, *Korzun v. N.Y. Stoom v. Maats Nederland v. Jarka Corp.* It recognized the cases were procedurally distinguishable but adopted the reasoning of the Maryland District Court. When a civil action is filed and a jury trial requested, by amendment of the complaint plaintiff cannot indirectly deprive a party of his right to trial by jury. The specific rules governing jury trials, Rule 38 and Rule 39, cannot be circumvented by the relation back provisions of Rule 15 (c), covering general amendments to pleadings.

Decisions in other Circuits agree. The Third Circuit in *Yates v. Dan*, 233 F.2d 64 (3rd Cir. 1955) held that following a demand for a jury trial under the Jones Act, plaintiff could not transfer the suit to admiralty and deprive defendant of a trial by jury. Under Rule 38 (d) and Rule 39 (a) he must secure the written consent or oral consent in open Court of the defendant. See, *Thomas v. Penninsula & Oriental Steamship Nav. Co.*, 246 F.Supp. 592 (E.D.Pa. 1965); *Famiano v. Enyeart*, 398 F.2d 661 (7th Cir. 1968); *McAndrews v. U.S. Lines*, 167 F.Supp. 41 (S.D.N.Y. 1958).

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The Fifth Circuit decision is not a constrained interpretation of the Federal Rules of Civil Procedure, 28 U.S.C.A. It is consistent with settled rules of construction. The specific rules, Rules 38 and 39, governing a right to a trial by jury should take precedence over the general rule, Rule 15 (c), governing the broad subject of changes in pleadings.[4]

The decision is not in direct or implied conflict with this Court's decision in *Fitzgerald v. United States Lines*, 374 U.S. 16, 83 S.Ct. 1646 (1963). *Fitzgerald* does not discuss the issue at bar. However, it does support the Fifth Circuit's decision. A seaman had sued a shipowner for Jones Act negligence, unseaworthiness and maintenance and cure. He demanded a jury trial. The District Judge determined that he would reserve the issue of maintenance to himself but submit the other issues to the jury. This Court reversed; it held that all issues should be tried to the jury, an honored institution in our jurisprudence:

> "While this Court has held that the 7th Amendment does not require a jury trial in Admiralty cases, neither the amendment nor any other provision of the Constitution forbids them, nor does any statute of Congress, or Rule of Procedure, Civil or Admiralty, forbid jury trial in Maritime cases . . ." (374 U.S. at p. 20)

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4 In *Pacific Gas & Electric Co. v. Fibreboard Products, Inc.*, 116 F.Supp. 377 (N.D.Cal. 1953), the Court resolved a conflict between Rule 15 (a) and Rule 21. The two rules must be resolved in favor of the specific (Rule 21) over the general (Rule 15[a]).

Petitioners reliance on the Advisory Committee Notes is misplaced (Petition. App. D. p. 64). What the Advisory Committee intended by paragraph (h) of Rule 9 was that where a plaintiff filed an action with separate jurisdictional bases, of which one was a traditional admiralty claim, he could add an identifying statement to reserve distinctly maritime remedies, such as attachment and garnishment or actions *in rem*, in accord with Rule 15. This does not mean that requirements of other specific Rules of Procedure affected can be ignored.

Contrary to Petitioners' thesis, the Committee stated:

> "Thus, at present the pleader has power to determine procedural consequences by the way in which he exercises the classic privilege given by the savings to suitors clause (28 U.S.C. 1333) or by equivalent statutory provisions. For example, a longshoreman's claim for personal injuries suffered by reason of the unseaworthiness of a vessel may be asserted in a suit in admiralty or, if diversity of citizenship exists, in a civil action. One of the most important procedural consequences is that in the civil action *either party* may demand a jury trial, while in the suit in admiralty there is no right to trial by jury except as provided by statute." (Petitions, App. D) (Emphasis supplied)

In the authoritative *Moore's Federal Practice*,[5] which contains the Advisory Notes, the editor's clear

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5 5 *Moore's Federal Practice*, Sec. 38.12 (2), p. 128.25.

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statement is contrary to Petitioners' position and on all fours with the *en banc* opinion of the Fifth Circuit:

> "An Action by an injured seaman, or his personal representative, against his employer under the Merchant Marine Act, popularly known as the Jones Act, is an action at common law comparable to an action by an injured railway employee under the Federal Employers' Liability Act. *The Jones Act expressly provides for trial by jury. And since the action, if brought in a federal district court is subject to the Federal Rules, Rules 38 and 39 govern demand and waiver.*" (*Moore's, supra,* at p. 128.25-128.26)

The interpretation of the Rules is consistent with the ordinary administration of justice which requires that at some time the determination of whether a case shall be tried to a jury or without jury be reached and thereafter adhered to.

Complementing Bases Support The Fifth Circuit's Decision

It is evident on the facts that Petitioners are feigning their allegation that an unprecedented trial by jury has been created in admiralty. However, common law courts have always had jurisdiction of a cause of action in tort for damages when a shipowner could be reached personally. This concurrent right was not excluded by the admiralty grant in the Constitution. The common law jurisdiction is retained except for the power and authority of admiralty courts to declare uniform maritime law and to issue special admiralty procedures. 1 *Benedict On Admiralty*, A. W. Knauth

(7th Ed. Rev.) Chapter VIII, Sec. 121, p. 8-1. *Scoonmaker v. Gilmore*, 102 U.S. 118, 26 L.Ed. 95 (1890). A suit to enforce a legal right at common law carries with it the right to trial by jury under the Seventh Amendment. *Ross v. Bernard*, 396 U.S. 531, 534, 90 S.Ct. 733, 735 (1970).

Thus, this Court has held that diversity jurisdiction carries with it the right to a trial by jury as part of the remedy, and the provisions of the Seventh Amendment are brought into play[6]. The admiralty remedies for maintenance and cure and unseaworthiness are subject to diversity jurisdiction on the law side of the Court under the savings to suitors clause with the right of trial by jury. The same is true when there is pendent jurisdiction under the Jones Act.[7]

Separately, Petitioners filed at law claims under the Jones Act, 46 U.S.C.A., Section 688. The Jones Act adopts all jurisprudence developed under the Federal Employers' Liability Act, 45 U.S.C.A., Section 51, et seq. This Court has held that the act provides a legal cause of action affording litigants the right to trial by jury under the Seventh Amendment as part and parcel of the remedy.[8]

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6 *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 360, 82 S.Ct. 780, 784, 7 L.Ed.2d 798 (1962), reh. denied at 369 U.S. 882, 82 S.Ct. 1137, 8 L.Ed.2d 284, motion denied 371 U.S. 803, 83 S.Ct. 15, 9 L.Ed.2d 51. Also, *Williams v. Tidewater Associated Oil Co.*, 227 F.2d 791 (9th Cir. 1955), cert. denied 350 U.S. 960, 76 S.Ct. 348.

7 *Fitzgerald v. United States Lines*, 374 U.S. 16, 83 S.Ct. 1646 (1963).

8 *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, supra, Note 6; *Schultz v. Pennsylvania R.R. Co.*, 350 U.S. 523, 76 S.Ct. 608 (1956); *Bailey v. Central Vermont Ry.*, 319 U.S. 350, 63 S.Ct. 1062 (1943); *Planters Manufacturing Co. v. Protection Mut. Ins. Co.*, 380 F.2d 869, 874 (5th Cir. 1967).

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In *Atlantic & Gulf Stevedores, Inc. v. Ellerman*,[9] this Court held:

> "This suit being in the federal courts by reason of diversity of citizenship carried with it, of course, the right to trial by jury. *As in cases under the Jones Act * * * and under the Federal Employers' Liability Act * * * trial by jury is part of the remedy. Thus the provisions of the Seventh Amendment, noted above, are brought into play.* * * * As we recently stated in another diversity case, *it is the Seventh Amendment that fashions 'the federal policy favoring jury decisions of disputed fact questions.'* " (369 U.S. at 360) (Emphasis supplied)

Petitioners' contention before this Court that the Fifth Circuit Court of Appeals has created a right to trial by jury in an exclusively admiralty claim is not correct. Its decision does not depart from prior jurisprudence and it conflicts with no decision of this Court or any Circuit Court.

2. **The Fifth Circuit's En Banc Decision Excluding Evidence of the Influence on Damages of Future Possible Inflation or Deflation and Requiring Reduction to Present Value is Correct. It does not Conflict with the Decision of any Other United States Court of Appeal or any Decision of this Court; it Adheres to Established Principles.**

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9 *Supra*, Note 6.

The decision of the Fifth Circuit *en banc* is supported by decisions in the other Circuits[10] and conflicts with none. This was emphasized in its opinion. (510 F.2d 234, 236).

Petitioners claim that the Fifth Circuit has circumscribed the dictates of this Court in *Chesapeake & Ohio Railway v. Kelly*, 241 U.S. 485, 36 S.Ct. 630, 60 L.Ed. 1117 (1916). This contention is spurious. In *Kelly*, this Court held that the present cash value of future earnings is the proper measure of recovery in actions under the Federal Employers' Liability Act. The Fifth Circuit specifically considered and adhered to the *Kelly* doctrine.[11] The panel opinion, adopted *en banc*, stated that in *Kelly:*

> "The United States Supreme Court, reversed, holding that the present cash value of future earnings is the proper measure of recovery in

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10 *Williams v. United States*, 435 F.2d 804, 807 (1st Cir. 1970); *Yodice v. Koninklijke Nederlandsche Stoom. Maat*, 443 F.2d 76, 79 (2d Cir. 1971); *Magill v. Westinghouse Electric Corp.*, 464 F.2d 294, 301 (3rd Cir. 1972); *Frankel v. Heym*, 321 F.Supp. 1331, 1346, 466 F.2d 1226 (3rd Cir. 1972); *Hoffman v. Sterling Drug, Inc.*, 485 F.2d 132, 143-144 (3rd Cir. 1974) and discussion on remand at 374 F.Supp. 850, 852-855 (M.D.Pa. 1974); *Sleeman v. Chesapeake & Ohio Railway Co.*, 414 F.2d 305, 308 (6th Cir. 1969); *Petition of U.S. Steel Corp.*, 436 F.2d 1256 (6th Cir. 1970), cert. denied, 402 U.S. 987, 91 S.Ct. 1649, 29 L.Ed.2d 153 (1971), cert. denied, 402 U.S. 987, 91 S.Ct. 1660, 29 L.Ed.2d 153 (1971), cert. denied, 402 U.S. 987, 91 S.Ct. 1665, 29 L.Ed.2d 153 (1971), reh. denied, 403 U.S. 924, 91 S.Ct. 2227, 29 L.Ed.2d 703, reh. denied, 403 U.S. 940, 91 S.Ct. 2247, 20 L.Ed.2d 720 (1971); *Furimizo v. United States*, 245 F.Supp. 981, 1013 (D.Hawaii 1965), aff'd., 381 F.2d 965, 971 (9th Cir. 1967).

11 Same interpretation, see *Sleeman, supra*, 414 F.2d 305, 307 (6th Cir. 1969).

actions brought under the Act." (510 F.2d 234, at 239).

The Fifth Circuit has held that the discount rate to be used should be the rate on long term conservative investments at the time and place of trial (510 F.2d 234, 237). This is synonymous with the established jurisprudence as reflected in the 1939 *Restatment of Torts*, Sec. 924, p. 631:

> "In ascertaining the present worth of the future loss of earnings, that is in discounting the recovery because future losses are paid for in advance, the rate of discount is based upon the *current return* upon long term investments if the perspective losses are long continued." (p. 634-635) (Emphasis supplied)

The Fifth Circuit *en banc* incorporated the panel opinion which discussed the *Restatement of Torts* and *Kelly* (510 F.2d 234, 239-240). The Court specifically concluded that on re-trial the discount rates to be applied shall conform with the Supreme Court's comments in *Kelly* and its decision in *Blue v. Western Railway of Alabama*, 469 F.2d 487 (5th Cir. 1972), as modified. (510 F.2d 234, 241)

The Fifth Circuit did not unequally apply the law as Petitioners contend. The trier of fact should not consider the speculative influence of possible future inflationary or deflationary trends over decades in projections of future lost earnings or in projection of the discount rate. To achieve reasonable certainty and to promote efficient administration of justice, the Court decided that such forecasting should be eliminated as

beyond judicial determination and that damage awards should be based on current dollars at current discount rates.

There is no inconsistency. It is entirely speculative to judicially attempt to forecast wage rates in the future as influenced by monetary trends. There is no present market to delineate long term wages over 10, 20, or 30 years. And, any conjecture based on subjectively selected factors can be controverted by exogenous economic influences; for instance, governmental policy. This is distinct from the determination of the discount rate by the market place, which sets long term rates over decades into the future. A particular security, bond or annuity can be purchased today affording a fixed rate of return. The rate is available at the time of trial; it is certain; it is known over the balance of work life expectancy. It makes no quantative difference whether a person receives the money as it is earned in the future or the same amount now in a lump sum discounted to present value at a rate of interest actually available to him.[12]

The *en banc* opinion avoids extreme speculations on future monetary trends both in their possible impact upon future lost earnings and upon future discount rates. Following historical principles, future earnings are to be reduced to present value by use of an appropriate interest rate prevailing at the time and place of trial. (510 F.2d 234, 237)

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12 In *Kelly*, *supra*, p. 13, reduction to present value also utilized interest rates available on long term investments, including securities, bonds or annuities.

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In accord with *Kelly*, the *Restatement of Torts*, and *Penrod*, the discount rate will be a conservative rate on present long term investments consistent with the background and experience of the individual. It will be a rate not subject to the fluctuations of monetary trends, a rate scaled and in keeping with safe investments which require the least care and yield a relatively moderate return. Thus, lump sum awards for lost earnings are discounted at an interest rate available to Petitioners when received. Should Petitioners elect not to utilize available long term interest rates, i.e. they think they can exceed that rate of return by making short term, periodic investments, they may gain a greater return if high inflation occurs, a lesser return if deflation or lower inflation occurs, or stay even.

Despite Petitioners' contentions, the decision of the Fifth Circuit Court of Appeals does not prohibit consideration of future increases in Petitioners' earnings. As has always been true, it simply requires that future damage awards be based on competent evidence of Petitioners' individual earnings record and prospects. Petitioners want to substitute entirely speculative evidence for the traditional measures of a man's damages.

Petitioners cite *Gruenthal v. Long Island RR Co.*, 393 U.S. 156, 89 S.Ct. 331 (1968) as conflicting. The issue in *Gruenthal* was whether the second Circuit should have disturbed a jury verdict as excessive. This Court reviewing the facts said no — the verdict did not constitute a denial of justice. The issue at bar was never involved.

We note Petitioners' contention that with allegations of diversity of citizenship the law of the state should control the measure of damages. We doubt that it is seriously urged. The fact that diversity also forms the basis of jurisdiction does not make the forum state's law applicable. *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409-411, 74 S.Ct. 202 (1953); *Streatch v. Associated Container Transp., Ltd.*, 388 F.Supp. 935, 937-38 (C.D. Cal. 1975). In claims arising under Federal law, such as the Federal Employers' Liability Act, the Jones Act, or unseaworthiness, the cause of action is Federally created and damages are to be measured by Federal law.[13]

CONCLUSION

The *en banc* decision of the Fifth Circuit adheres to established jurisprudence in assessing the present value of future earnings and regarding the right to trial by jury preserved to litigants. It conflicts with no decision by this Court or another Circuit Court and

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13 *Chesapeake & Ohio Ry. Co. v. Kelly*, *supra*, p. 13; *Mondou v. New York, New Haven & Hartford RR Co.*, 223 U.S. 1, 32 S.Ct. 169 (1911); *Chicago, M. & St. P. Ry Co. v. Coogan*, 271 U.S. 472, 46 S.Ct. 564 (1926); *Dice v. Akron, Canton & Youngstown RR Co.*, 342 U.S. 359, 72 S.Ct. 312, 314 (1952); *Ellis v. Union Pacific RR Co.*, 329 U.S. 649, 67 S.Ct. 598, 599 (1947); *Sleeman v. Chesapeake & Ohio Ry. Co.*, 414 F.2d 305, 307 (6th Cir. 1969); *Hall v. Minnesota Transfer Ry Co.*, 322 F.Supp. 92, 95; *Gypsum Carrier, Inc. v. Handelsman*, 307 F.2d 525, 535 (9th Cir. 1962); *Mascuilli v. United States*, 411 F.2d 867, 872 (3d Cir. 1969); *In Re Farrell Lines, Ltd.*, 339 F.Supp. 91, 93. (E.D.La. 1971); *Isgett v. Seaboard Coast Line RR Co.*, 332 F.Supp. 1127, 1142 (D.S.C. 1971).

raises no substantial issues that warrant review on writ of certiorari. The Petitions should be denied.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing brief has been served upon opposing counsel of record by placing the same properly addressed in the United States Mail with adequate postage affixed thereto this ____ day of August, 1975.

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BLEED T